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8                   **IN THE UNITED STATES DISTRICT COURT**  
9                   **IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE**

10                  DANG QUANG NGUYEN, a single man, ) NO. 2:09-cv-03728-PVT

11                  )

12                  Plaintiff,   )           **MOTION TO AMEND COMPLAINT**

13                  )

14                  vs.           )

15                  )

16                  STATS CHIPPAC, INC., a Delaware   )

17                  )

18                  Corporation,           )

19                  )

20                  Defendants. )

21                  )

22                   **MOTION**

23                  Previously unrepresented Plaintiff Dang Quang Nguyen, by and through undersigned  
24                  counsel, hereby moves this Court for an order permitting Plaintiff to amend his complaint to  
25                  add six additional counts and two additional parties to the Complaint pursuant to Rule 15 of the  
Federal Rules of Civil Procedure.

26                  WHEREFORE, Plaintiff respectfully requests this Motion be granted, and the lodged  
27                  First Amended Complaint be filed. This Motion is more fully supported by the below  
28                  Memorandum of Points and Authorities, which by this reference is incorporated herein.

**1 MEMORANDUM OF POINTS AND AUTHORITES****2 I. FACTUAL BACKGROUND AND FIRST AMENDED ALLEGATIONS**

3 Plaintiff Dang Quang Nguyen filed the Original Complaint against Defendant STATS  
4 ChipPAC, Inc. alleging violations of Title VII. At the time Plaintiff filed the original  
5 Complaint, he was not represented by counsel. Mr. Nguyen is a Vietnamese nationalist with  
6 limited English abilities and understanding. Plaintiff retained undersigned counsel on or about  
7 September 8, 2009 during which time a Vietnamese interpreter was present. Through the  
8 interpreter, Mr. Nguyen explained additional facts that were not present in the original  
9 Complaint.

10 At or around February 12, 2009, Plaintiff was forced to sign a Separation Agreement  
11 and Release of Claims (“Agreement”) prior to his termination from Defendant STATS  
12 ChipPAC. Plaintiff was being terminated because of his repeated complaints about the  
13 harassment to which he was exposed. The Agreement allegedly released all claims Plaintiff  
14 had against STATS relating to his employment at STATS up to the date of the Agreement. The  
15 release of claims included state law claims and Title VII claims.

16 Prior to STATS’ presentation of the Agreement, Plaintiff had made several complaints  
17 to his supervisors about workplace harassment from other co-workers because of his race and  
18 national origin. STATS set to terminate Plaintiff’s employment and present him with the  
19 Agreement to release any and all claims he may have against STATS. When Plaintiff was  
20 presented with the Agreement, STATS knew that Plaintiff’s command of the English language  
21 was limited. Due to Plaintiff’s limited command of the English language and lack of  
22 knowledge of the meaning of legal terms, he was not aware of what he was signing. In fact,  
23  
24  
25

1 Plaintiff believed he was signing a “general severance package” that would compensate him in  
 2 the amount of approximately \$10,000 for his past work.

3 Plaintiff asked STATS whether he would be giving up his Title VII rights against the  
 4 Company by signing the Agreement, and STATS, knowing Plaintiff’s command of the English  
 5 language was limited, confirmed and assured that he would not do so by execution. STATS  
 6 made these representations knowing of Plaintiff’s lack of knowledge of what he was signing  
 7 and with the intent to induce Plaintiff into relying on their representations. At no time did  
 8 STATS offer Plaintiff the opportunity to consult with a lawyer relating to executing the pre-  
 9 crafted Agreement, and STATS did not offer Plaintiff to translate the Agreement into  
 10 Vietnamese.

## 13 **II. ARGUMENT AND SUPPORTING LAW**

### 14 **A. JUSTICE WARRANTS PERMITTING PLAINTIFF TO AMEND COMPLAINT**

15 Rule 15(a) of the Federal Rules of Civil Procedure states a party may amend his  
 16 pleading with leave of the Court, and the “court should freely give leave when justice so  
 17 requires.” “Five factors are taken into account to assess the propriety of a motion for leave to  
 18 amend: bad faith, undue delay, prejudice to the opposing party, futility of the amendment, and  
 19 whether the plaintiff has previously amended the complaint.” *Johnson v. Buckley*, 356 F.3d  
 20 1067, 1077 (9<sup>th</sup> Cir. 2004) (citing *Nunes v. Ashcroft*, 348 F.3d 815, 818 (9<sup>th</sup> Cir. 2003)); accord  
 21 *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 532 (9<sup>th</sup> Cir. 2008).

23 As an initial matter, Plaintiff has not yet amended his Complaint and there is no bad  
 24 faith. Furthermore, there has been no undue delay as these proceedings are merely a month old,  
 25 and prior to initiating this action Plaintiff was not represented by counsel and had no

1 knowledge of the applicable law that is the subject of the counts sought to be added. Finally,  
2 there would be no prejudice to Defendant STATS ChipPAC, Inc. because discovery has not yet  
3 taken place, and the Scheduling Order has not yet been filed.  
4

**B. PLAINTIFF'S AMENDED COMPLAINT WOULD NOT BE FUTILE**

5 A proposed amendment is futile if no set of facts can be proven that would constitute a  
6 valid and sufficient claim. *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9<sup>th</sup> Cir. 1988).  
7 Rule 8 of the Federal Rules of Civil Procedure only requires a “short and plain statement of the  
8 claim showing that the pleader is entitled to relief.” Plaintiff here is amending the two Title VII  
9 counts and adding six additional counts.  
10

**Count 1: Title VII Hostile Work Environment**

12 Title VII proscribes discrimination based on race and national origin. 42 U.S.C. §  
13 2000e. Harassment based on race and national origin becomes unlawful when it “has the  
14 purpose or effect of unreasonably interfering with an individual’s work performance or creating  
15 an intimidating, hostile or offensive work environment.” 29 C.F.R. § 1604.11(a). “To prevail  
16 on a hostile work environment claimed premised on race, a plaintiff must demonstrate: (1) that  
17 he was subjected to verbal or physical conduct of a racial or sexual nature; (2) that the conduct  
18 was unwelcome; and, (3) that the conduct was sufficiently severe or pervasive to alter the  
19 plaintiff’s employment or create an abusive working environment.” *Gregory v. Widnall*, 153  
20 F.3d 1071, 1074 (9<sup>th</sup> Cir. 1998).  
21

23 In the lodged First Amended, Plaintiff adequately pleads the necessary elements.  
24 Plaintiff alleges that he was verbally harassed since 2005 until his termination in 2009 due his  
25 race and national origin, and he did not welcome the harassment. Plaintiff further alleges that

1 the pervasiveness of the harassment was such that he had a difficult time even going to work  
2 due to the intimidation and harassment he suffered every day. Furthermore, STATS failed to  
3 conduct any investigation of the harassing conduct even though Plaintiff often complained to  
4 his supervisor about the harassment.  
5

6 **Count 2: Title VII Retaliation**

7 Title VII defines “retaliation” as a form of unlawful discrimination and states: “It shall  
8 be an unlawful employment practice for an employer to discriminate against any of his  
9 employees...because [the employee] has opposed any employment practice made unlawful by  
10 this subchapter.” Plaintiff must demonstrate the following to establish a prima facie case of  
11 retaliation: “1. she engaged in a protected activity; 2. her employer subjected her to an adverse  
12 employment action; and 3. a causal link exists between the protected activity and the adverse  
13 action.” *Ray v. Henderson*, 217 F.3d 1234, 1240 (9<sup>th</sup> Cir. 2000). “[An] informal complaint to a  
14 supervisor is ... a protected activity.” *Equal Employment Opportunity Commission v.*  
15 *Hacienda Hotel*, 881 F.2d 1504, 1514 (9<sup>th</sup> Cir. 1989).

16 Plaintiff adequately gives notice as he alleges that he was terminated as a direct result of  
17 his constant harassment-based complaints to his supervisor. There is no question termination is  
18 an adverse employment action.  
19

20 **Count 3: Declaration of Ineffective Waiver of Federal Rights**

21 The waiver of federal claims is governed by federal law, and such a waiver is not valid if  
22 it is not knowing and voluntary. *Stroman v. West Coast Grocery Co.*, 884 F.2d 458, 461 (9<sup>th</sup>  
23 Cir. 1989). Mr. Nguyen’s alleged waiver of his Title VII rights when executing the agreement  
24 was no where close to being knowing and voluntary as he was first not even aware of what he  
25

1 was signing and had the understanding he was signing a completely different document. In the  
 2 face of Defendants' acts of misrepresenting the content of the agreement coupled with Mr.  
 3 Nguyen's severely limited English skills, he executed the agreement.  
 4

5 **Count 4: Declaration of Ineffective Release of State Law Claims**

6 Similarly here, Plaintiff claims the agreement was not valid because of the several  
 7 misrepresentations made by Defendants inducing Plaintiff to execute the agreement. The  
 8 misrepresentations made by Defendant are more fully discussed infra.

9 **Count 5: Intentional Infliction of Emotional Distress**

10 The elements of a prima facie case of intentional infliction of emotional distress are:  
 11 “(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless  
 12 disregard of the probability of causing, emotional distress; (2) the plaintiff’s suffering severe or  
 13 extreme emotional distress; and (3) actual and proximate causation of the emotional distress by  
 14 the defendant’s outrageous conduct. *Davidson v. City of Westminster*, 32 Cal.3d 197, 201  
 15 (1982). The failure to redress complaints of Title VII harassment constitutes extreme and  
 16 outrageous conduct where the employer has actual knowledge of the facts or is ignorant “of the  
 17 facts [that] arises from the principal’s own failure to investigate and the circumstances are such  
 18 as to put a reasonable man on inquiry...” *Reusche v. California Pac. Title Ins. Co.*, 231 Cal.  
 19 App. 2d 731, 737 (1965); *accord, Hutchinson Co. v. Gould*, 180 Cal. 356, 358 (1919); *Foth v.*  
 20 *Bice*, No. E028126 (Cal. App. Dist. 4 03/06/2002). Furthermore, [g]iven an employee’s  
 21 fundamental civil right to a discrimination free environment, by its very nature, [Title VII]  
 22 harassment in the work place is outrageous conduct as it exceeds all bounds of decency usually  
 23 tolerated by a decent society,” *Fisher v. San Pedrom Peninsula Hospital*, 214 Cal. App. 3d  
 24  
 25

1 (1989), and an “employer is liable for the willful and malicious torts of its employees  
2 committed in the scope of employment.” *Id.* (“Thus, if Ms. Fisher properly pleads an  
3 environmental sexual harassment cause of action, then she will have also pled sufficient facts to  
4 establish a claim against SPPH for intentional infliction of emotional distress”).  
5

6 Plaintiff adequately pleads IIED on a ratification and respondeat superior basis as it is  
7 alleged that Defendants failed to take adequate remedial measures to address the complaints  
8 made by Plaintiff notwithstanding they had actual knowledge of the complaints and harassment  
9 to which Plaintiff was exposed. Furthermore, pursuant to *Fisher* supra, Plaintiff adequately  
10 pleads IIED on a respondeat superior theory as Plaintiff was exposed to racial and national  
11 origin harassment on a daily basis.  
12

### 13 **Count 6 & 7: Intentional Misrepresentation & Fraud**

14 A complaint for fraud must plead misrepresentation, knowledge of falsity, intent to  
15 induce reliance, justifiable reliance, and resulting damages. *Lazar v. Superior Court*, 12 Cal.4<sup>th</sup>  
16 631, 638 (1996); 5 Witkin, Summary of Cal. Law (10<sup>th</sup> ed. 2005) Torts, § 772, p. 1135. The  
17 elements required for intentional misrepresentation are similar. There must be a  
18 misrepresentation, made with knowledge of its falsity and with an intent to defraud or induce  
19 reliance, justifiable reliance, and resulting damage. *Id.* at § 772, p. 1121.  
20

21 Plaintiff has adequately pled both torts as Plaintiff alleges that Defendants  
22 misrepresented that he was not giving up his Title VII claims or other state law claims when  
23 signing the Agreement. This was after Plaintiff advised Defendants that he did not understand  
24 the Agreement due to his limited English skills and specifically asked whether he would be  
25 giving up such claims. Defendants allowed Plaintiff to execute the Agreement knowing the

1 representations were false and with the intent to have Mr. Nguyen execute the Agreement and  
 2 sign away his federal rights.

3 **C. SUPPLEMENTAL JURISDICTION OVER STATE LAW CLAIMS IS**  
 4 **WARRANTED**

5 It is clear that the operative facts of the lodged First Amended Complaint center around  
 6 Plaintiff's Title VII complaints and his alleged waiver thereof. The state law claim of  
 7 intentional infliction of emotional distress centers around the same facts of the discrimination  
 8 claims, which include Defendants' knowledge of Plaintiff's complaints, and Defendants' failure  
 9 to redress the harassment in any manner or investigate his complaints. Finally, the state law  
 10 claims surrounding the ineffectiveness of the Agreement also center around the lengths to  
 11 which Defendants would go to ensure that Plaintiff did not assert Title VII claims against them.

12 **III. CONCLUSION**

13 For the foregoing reasons, Plaintiff respectfully requests an Order permitting him to file  
 14 his lodged First Amended Complaint. A struck-through/bracketed copy of the First Amended  
 15 Complaint is attached as Exhibit 1, and a clean copy shall be lodged with the Clerk. A  
 16 proposed form of Order is attached as Exhibit 2.

17  
 18  
 19  
 20 RESPECTFULLY SUBMITTED this 18<sup>th</sup> Day of September, 2009.

21  
 22 THE LAW FIRM OF PETER STROJNICK

23  
 24  
 25   
 Peter Kristofer Strojnik  
 Attorney for Plaintiff